

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

435

BRIEF OF APPELLANT, RICHARD VEREEN

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Docket Number 23173

RICHARD VEREEN

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia Circuit

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for the District of Columbia
Circuit

QUESTIONS PRESENTED

1. Should Stephen Potts, appellant's Court-appointed trial attorney, have been permitted to testify for the purpose of impeaching the complaining witness, Mason?

2. Was it plain error for the Court to instruct the jury on the question of flight after the crime where there was no evidence of flight?

3. Was it plain error for the Court to fail to instruct the jury on lesser-included offenses?

- - -

This case has not previously been before this Court.

RICHARD VEREEN

Appellant,

v.

UNITED STATES OF AMERICA,

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia rendered on May 15, 1969, in Criminal Trial No. 76-67 by Judge June L. Green against Richard Vereen, appellant herein and defendant below, following a jury verdict of guilty rendered and filed March 26, 1969. Defendant filed Notice of Appeal on May 16, 1969, and by Order dated May 20, 1969, the United States District Court allowed defendant to prosecute his appeal in forma pauperis.

Jurisdiction of this Court is invoked pursuant to the Act of June 25, 1943, c. 645, 62 Stat. 929, 28 U.S.C. §1291, which provides in relevant part as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

STATEMENT OF THE CASE

Appellant Richard Vereen was indicted by the Grand Jury on January 3, 1967, for housebreaking and robbery in violation of 22 D. C. Code 1301 and 22 D. C. Code 2901. Appellant was tried before a jury in the United States District Court for the District of Columbia on March 25 and 26, 1969. He was convicted and sentenced to imprisonment for a period of three to nine years on each count, the sentences on each count to run concurrently.

In the trial below, the defense of the defendant, Richard Vereen, was that he was forced and coerced by an acquaintance named Gregory Johnson, who is also known as Big Red, to rob the complaining witness, Carthan E. Mason. Defendant Vereen testified that on January 3, 1967, the day of the robbery, at about 2:30 in the afternoon he was at 7th and T Streets, N. W., in Washington, D. C., conversing with a friend about doing some housepainting after work and that Johnson, whom he knew only from working with him about three days at an earlier time, overheard the conversation and told

Vereen that he knew where he could get some paint. (Tr. 23-29). Johnson told Vereen about the complaining witness, Mason, and that Mason had some paint which he would give Vereen. (Tr. 29). Accordingly, Johnson and Vereen went to the room where Mason lived and on arriving there Johnson began attacking Mason. (Tr. 30). Johnson then pulled a knife and threatened to cut Vereen's throat if he did not go through Mason's pockets and get his money. (Tr. 31). He testified that Johnson was much bigger than he, or in his own words "he makes about three of me", (Tr. 32) and that he was frightened and that he did what Johnson ordered him to do. (Tr. 30-31). After the crime, Johnson forced Vereen to give him the money he had taken from Mason and they parted. (Tr. 9, 31-32). Vereen testified that Big Red was half running. (Tr. 32). Vereen went about half a block and stopped for a cup of coffee at the corner of 7th and S Streets. (Tr. 31, 37). About half an hour later he was on his way home which took him past Mason's house, where he intended to stop and see Mason, when he was arrested. (Tr. 37). The complaining witness, Mason, testified that Johnson attacked him (Tr. 3) and that Vereen went through his pockets and

found his money, but his testimony concerning Vereen's contention that Johnson drew the knife and threatened to cut Vereen's throat, is cloudy. On cross-examination Mason appears to have testified that Johnson pulled a knife on Vereen and forced him to rob Mason, as follows:

Q: "Now, isn't it true, Mr. Mason, that at that time, you said that Red, Gregory Johnson, had pulled a knife on Richard Vereen, and told him he would have to help Red rob you or he was going to cut up Richard Vereen?"

A: "Yes, he will tell you the same thing, yes, Sir." (Tr. 15)

On re-direct examination, however, Mason appears to refute his prior testimony as follows:

Q: "Well, let me ask you this. At the time you and Vereen and Red were in that room, the three of you were in there, at 705 S Street, during that time did Red ever threaten Vereen with a knife during that time?"

A: "No". (Tr. 17).

At the conclusion of the government's case, Mr. Stephen Potts, defendant's court-appointed attorney, requested the Court to permit him to testify and offered to testify

that Mr. Mason came to his office and told him what happened of his own free will, and said he had seen the switchblade knife, 12 inches long, in the hands of Big Red and that the knife had been used to threaten Vereen and he indicated that was what happened. (Tr. 27). Mr. Potts requested permission to withdraw as attorney for Vereen and offered to have one of the attorneys in his office assume the duties of Vereen's counsel so that Potts could testify. The Court expressed the opinion that this would not be in the best form and that it was inappropriate for counsel to insert himself as a witness and accordingly overruled Mr. Potts' request. (Tr. 28).

At the conclusion of the case, the trial judge instructed the jury on the question of flight to the effect that the jury could consider evidence of flight by the defendant after the crime as tending to prove the defendant's consciousness of guilt.

The trial judge did not give any instructions on unlawful entry and simple assault, lesser included offenses of housebreaking and robbery respectively.

STATEMENT OF POINTS

1. The lower court committed reversible error in refusing to permit Stephen Potts, appellant's court-appointed trial attorney, to testify for the purpose of impeaching the complaining witness.

With respect to Point One, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 27-28 inclusive.

2. The court committed reversible error when it instructed the jury on the question of flight after the crime when there was no such evidence.

With respect to Point Two, appellant desires the court to read the following pages of the reporter's transcript: Tr. 16, 31-32, 37-38, 65.

3. The court committed reversible error when it failed to instruct the jury on the elements of unlawful entry and assault, lesser included offenses of housebreaking and robbery, respectively.

SUMMARY OF ARGUMENT

Appellant had the right to call his court-appointed attorney as a witness to testify for the purpose of impeaching the Government's only witness of the crime. The refusal of the trial judge to permit the attorney to testify deprived appellant of his right to introduce relevant and material evidence which could not be obtained from any other source. The exclusion of this evidence was reversible error because, if believed, it could have resulted in an acquittal.

There was no evidence of flight by appellant after the crime and the only evidence was to the contrary. The court's instruction on flight was, therefore, misleading and prejudicial.

Unlawful entry is a lesser offense of housebreaking and simple assault is a lesser offense of robbery. It was plain error for the Court to fail to instruct the jury on the elements of unlawful entry and simple assault.

ARGUMENT

POINT ONE

STEPHEN POTTS, APPELLANT'S COURT-APPOINTED ATTORNEY, SHOULD HAVE BEEN PERMITTED TO TESTIFY FOR THE PURPOSE OF IMPEACHING THE COMPLAINING WITNESS, MASON.

It is well established in Federal Courts that an attorney who has participated in the trial is nevertheless competent to testify. U.S. v. Fiorillo, 376 F.2d 130, 2nd Cir., 1967). The opinion has even been expressed that it is not reversible error for an attorney to testify and thereafter continue to participate in the trial. Robinson v. U.S., 32 F.2d 505 (3th Cir., 1923). On the other hand, the trial court may refuse to permit an attorney to testify if his offered testimony is not competent in other respects, Gajewski v. U.S., 321 F.2d 261, (3th Cir., 1963), or if no reason is given for the attorney to testify, U.S. v. Chiarella, 134 F.2d 903 (2nd Cir., 1950), or if the evidence is available from other sources, U.S. v. Alu, 246 F.2d 29 (2nd Cir., 1957).

The courts have said that the practice of an attorney testifying is unusual and even sometimes of dubious propriety.

If prejudice or unfairness results, the remedy is not to refuse to permit such testimony if it is relevant and material but to require the attorney to withdraw entirely from the case after testifying. U.S. v. Fiorillo, supra. It has been held that it was not error to refuse to permit an attorney to testify where he refused to withdraw; U.S. v. Clancy, 276 F.2d 617 (7th Cir., 1960), nor is it error to permit an attorney to continue in the case after he has testified. Robinson v. U.S., supra. The application of the remedy appears to rest in the sound discretion of the trial court. In any case, it is reversible error to refuse to permit an attorney to give testimony otherwise admissible. Christensen v. U.S., 90 F 2 153, (7th Cir., 1937).

In the Christensen case, the defendant attempted to call one of his attorneys in the case as a witness to impeach a secretary in the defendant's firm who had been called by the Government. The appellate court held that the attorney's testimony was admissible and that it was error to exclude it.

Judge Burger, formerly of this Court and now Chief Justice of the United States, in a concurring opinion in

Jackson v. U.S., 297 F.2d 195 (D.C.C.A., 1961), criticized the trial attorney for not doing exactly what Mr. Potts requested the trial court to permit him to do in this case. In the Jackson case, the defense attorney asked a government witness a series of questions about what the witness allegedly had told him during a telephone conversation and the witness denied such a conversation. The defense attorney let the matter rest there and Judge Burger was of the opinion that he had the duty to testify, even if it meant withdrawing from the case.

In this case, there can be no doubt that Potts' proffered testimony was material and relevant. Mason, the complaining witness, was the only witness produced by the Government as to the crime. His testimony was often confused and contradictory. With respect to appellant's defense of coercion, Mason appeared to testify at one point that Johnson had pulled a knife on appellant and threatened to cut his throat if he did not take Mason's money and at another point he denied that this took place.

Potts offered to testify that Mason had told him

previously in Potts' office that Johnson had forced appellant to take Mason's money by pulling a knife on appellant and threatening to cut his throat. Potts' testimony would have had the effect of discrediting Mason and supporting the appellant's defense of coercion, and if believed by the jury, could have resulted in acquittal. It was, therefore, reversible error to exclude his testimony.

POINT TWO

IT WAS PLAIN ERROR FOR THE COURT TO INSTRUCT THE JURY ON THE QUESTION OF THE DEFENDANT'S FLIGHT AFTER THE CRIME WHEN THERE WAS NO EVIDENCE OF SUCH FLIGHT.

There was no evidence of flight by the defendant after the crime. As a matter of fact, the evidence was all to the contrary. After the crime, Johnson took the money which defendant Vereen had taken from Mason and Johnson and defendant parted, Johnson half running.

Defendant went around the corner about half a block and had a cup of coffee. After about a half an hour he set out for home going past Mason's lodgings and intending to stop

and see Mason. He was arrested in the immediate vicinity of Mason's home. The trial court, nevertheless, instructed the jury on flight, using the D. C. Bar Association instruction for this purpose.

This court has recently stated that instructions on flight should be used sparingly and that the D. C. Bar Association instruction on flight is inadequate and erroneous. Austin v. U.S., U.S. Ct. of App. D.C., No. 22,044, May 27, 1969.

In the Austin case, however, there was evidence of flight and this court held that it was not plain error to instruct the jury on flight in the absence of objection by defense counsel. In the pending case, there was no evidence of flight at all. It was misleading and prejudicial to give such an instruction and was plain error.

In the pending case, there was evidence that the defendant Vereen did not observe the conditions of his work release from the D. C. Jail in that he did not return to the D. C. Jail but went instead to North Carolina where his wife and two children lived. This occurred around April 26, 1967, and the crime occurred on January 3, 1967. It can hardly be

maintained that this constitutes flight after a crime in view of the remoteness in time and the variety of defendant's motives other than guilt of the actual crime, such as the desire not to be in jail, the desire to see his wife and children, the concern about his wife's ill health and her hospitalization and the like.

POINT THREE

IT WAS PLAIN ERROR FOR THE TRIAL COURT TO FAIL TO INSTRUCT THE JURY ON THE ELEMENTS OF LESSER INCLUDED OFFENSES.

Unlawful entry (D.C. Code Sec. 22-3102 1967 Ed.) is a lesser included offense of housebreaking. Glenn v. U.S., U.S. Ct. of App. for D.C., No. 22,162, July 23, 1959. Simple assault (D.C. Code Sec. 22-504, 1967 Ed.) is a lesser included offense of robbery.

It was error for the trial court not to instruct the jury on the elements of the lesser included offenses. .
Womack v. U.S., 119 U.S. App. D.C. 40; 336 F.2d 959 (1964);
Belton v. U.S., 127 U.S. App. D. C. 201, 206; 332 F.2d, 150 (1967).
The evidence was uncontradicted that defendant Vereen knew Mason,

the person who was robbed; that the door to Mason's room was open; that Johnson and not Vereen attacked Mason and that Vereen went through Mason's pockets and took his money. The trial court should have seen that the evidence clearly called for an instruction on lesser included offenses and the failure to give one was plain error. Rule 52(b), Fed. R. Crim. P.

CONCLUSION

For the foregoing reasons, the judgment of the lower Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant was served by hand this _____ day of _____, 1969, on the Honorable Thomas Flannery, Esq., United States Attorney for the District of Columbia, Attorney for Appellee, United States Court House, Washington, D. C.

WALTER S. FURLOW, JR.